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Supreme Court, U.S.
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No. 96-1429

In The

Supreme Court of the United States

October Term, 1996

PENN ADVERTISING OF BALTIMORE, INC.,

Petitioner,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, A MUNICIPAL CORPORATION; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; DAVID TANNER in his official capacity as the General Superintendent of Zoning Administration and Enforcement of Baltimore City,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In an effort to reduce illegal consumption of cigarettes by minors, Baltimore enacted an ordinance which restricts the placement of publicly visible cigarette advertisements. The questions presented are:

1. In determining the First Amendment constitutionality of a speech restriction on promotional advertising, may the reviewing court judicially notice the principle that promotional advertising increases consumption, and, if not, should the predictive judgments of the legislature supporting the restriction receive judicial treatment as adjudicative or legislative facts?

2. Is a restriction against publicly visible cigarette advertising in areas where children live, attend school, and engage in recreation, more extensive than necessary to achieve the governmental purpose of reducing illegal cigarette consumption by minors?

3. Whether an ordinance that restricts the location, but not the content, of cigarette advertising on billboards is preempted under the Federal Cigarette Labeling and Advertising Act.

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BRIEF IN OPPOSITION

Respondents (collectively "Baltimore") urge that the petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit, entered 13 November 1996, be denied for the reasons set forth below.

STATEMENT

Baltimore incorporates by reference the statement of facts in the opinion of the Fourth Circuit in *Penn I.* App., 4a-7a.

All that was before the lower courts, and all that is before this Court, is Baltimore City Ordinance 307 (1994) (the "ordinance"). App., 84a-92a. Petitioner's ("Penn") reference to a "later ordinance," Pet., 2, which was not mentioned in its complaint nor considered by the courts below, is improper and unavailing.

The purpose of the ordinance, as asserted by Baltimore and as held by the courts below, is to facilitate compliance with the state law that precludes sale of cigarettes to minors. *See,* App., 39a (opinion of the district court), *id.,* at 11a-12a (opinion of the court of appeals).

REASONS FOR DENYING THE WRIT

I. THERE IS NEITHER APPARENT NOR ACTUAL CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND THIS COURT'S DECISIONS

This case presents no compelling reason for review by this Court. The Fourth Circuit's decision was a correct application of the standards set forth in *Central Hudson* and its progeny, and was decided with faithful reference to *44 Liquormart*.

Furthermore, recent changes in federal law stongly militate against Supreme Court review of this case. Pursuant to 21 U.S.C. §360k(a), Baltimore's ordinance will become preempted on August 28, 1997, the effective date of new regulations issued by the United States Food and Drug Administration ("FDA") governing the sale, promotion, and distribution of cigarettes. *See*, 61 Fed. Reg. 44396, 44548-44549 (August 28, 1996). This case will become moot on August 28, 1997, subject to being resuscitated as a case or controversy only if Baltimore is granted an exemption from preemption pursuant to 21 U.S.C. §360k(b).[1]

A. The *Central Hudson* Third Prong

Rather than conflicting with decisions of this Court, the decision of the Fourth Circuit is quite apparently

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[1] FDA's "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents" are discussed in further detail at pages 12-13, *infra*.

consistent with them. The lower court upheld the ordinance under the third prong of the *Central Hudson* test because "[a]fter our own independent assessment, we recognized" the reasonableness of Baltimore's legislative finding that there is a definite correlation between cigarette advertising and underage smoking. *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3632 (U.S. March 10, 1997) (No. 96-1428), App., 50a (as adopted in *Penn II*, App. 2a). That holding is supported by a host of holdings and pronouncements from this Court. *See, Central Hudson*, 447 U.S. at 569 (third prong satisfied based on common sense); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981) (same) (plurality); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) judicial obligation to exercise independent judgment when First Amendment rights are implicated is to assure itself that government adduces "either empirical support or at least sound reasoning on behalf of its measures") (citation omitted); *Edenfield v. Fane*, 507 U.S. 761 (1993) (citing with approval *Central Hudson*, 447 U.S. at 569 (*supra*)); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993) (third prong satisfied based on common sense); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. at 2371, 2378 (1995) (empirical support justifying speech restrictions need not be "accompanied by a surfeit of background information," and speech restrictions may be upheld based on "simple common sense") (citation omitted); *44 Liquormart*, 116 S. Ct. at 1511 (Part VI) (Stevens, J., concurring) (commercial speech doctrine "recognize[s] some room for the exercise of legislative judgment").

In view of the demonstration which Baltimore made in the lower courts in support of its ordinance, and in view of the Fourth Circuit's "own independent assessment" of that demonstration, if the Fourth Circuit had done anything other than uphold the ordinance under the third prong of the *Central Hudson* test then its decision would have been directly in conflict with the decisions of this Court.

Baltimore met its burden under the *Central Hudson* third prong with both empirical support and sound reasoning. This Court has recently held that restrictions on commercial speech may be justified based on "simple common sense." *Florida Bar,* 115 S. Ct. at 2378. The common sense link between cigarette advertising on billboards and consumption of cigarettes by minors is self apparent. *Dunigan v. City of Oxford, Miss.*, 718 F.2d 738, 750 (5th Cir. 1983) (*en banc*), *cert. denied,* 467 U.S. 1259 (1984). *See also, Cal-Almond, Inc. v. United States Department of Agriculture,* 14 F.3d 429, 439 (9th Cir. 1993) ("The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised.").

Cases relied upon by Penn, such as *Edenfield; City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Ibanez v. Florida Dept. of Business and Professional Regulation,* 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); and *44 Liquormart,* are all distinguishable from the instant case. Those cases did not involve, as this one does, a logical or common sense link between the speech restraint and the governmental interest sought to be advanced. In those cases, without evidence compensating for the lack of a logical or common sense link

between the means and the ends, the efficacy of the speech restraint could be defended with nothing more than speculation.

This case does not provide a vehicle for re-examination of this Court's assumption, as a matter of law, that advertising increases consumption. Baltimore relied on more than judicial notice and common sense to satisfy its burden; it relied on evidence placed before the court. The Fourth Circuit sustained Baltimore's law based on a legislative record containing much more than tidbits of evidence or speculation. The studies placed before the court below demonstrate that advertising of the type restricted by Baltimore's ordinance plays a unique and significant role in stimulating illegal consumption of cigarettes by minors. As the Fourth Circuit observed:

> Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously-conducted studies detailing the correlation between cigarette advertising and the consumption of cigarettes by minors. The City Council found, as expressed in the preamble to Ordinance 307, that cigarettes are the most heavily advertised product in America and that "there is specific and convincing evidence that tobacco advertising plays a significant role in stimulating illegal consumption of cigarettes by minors." It referred specifically to 10 studies and articles supporting that position. The City Council also relied on the 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education to support its conclusion that cigarettes are the second most commonly abused substance by Maryland adolescents, with approximately 42%

> of twelfth graders and 11% of sixth graders having smoked cigarettes in the previous 12 months. The City Council emphasized further that 75% of twelfth graders had smoked cigarettes before the age of 15. It noted that cigarettes constitute a "gateway drug" for Maryland students, as they are often the first drug used by adolescents and "appear[ ] to 'open the door' for use of other harder drugs at a later date." Therefore, to reduce the illegal consumption of cigarettes by minors, the City Council concluded that it would be reasonable to restrict the placement of publicly visible cigarette advertisements in the City.

App., 5a.

Although this Court would find the legislative record supporting Baltimore's ordinance sufficient to satisfy Baltimore's burden under *Central Hudson*, it would not thereby clarify the law. *Cf., Florida Bar*, 115 S. Ct. at 2378 ("we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). Thus, review of the determination of the lower court as to the sufficiency of the evidence adduced by Baltimore in support of its ordinance would not, respondents respectfully submit, be a prudent use of this Court's certiorari jurisdiction.

The record in *Central Hudson* was far less factually developed than the record in the instant case. The Court determined, however, based on common sense, that the state's interest in energy conservation was directly advanced by a regulation prohibiting advertising that promoted the use of electricity. 447 U.S. at 569. As this Court observed, "the Commission adopted the restriction

because it was *deemed likely* to 'result in some dampening of unnecessary growth' in energy consumption." *Id.* at 560 (quoting *Consolidated Edison Co. v. Public Service Comm'n.*, 47 NY2d 94, 101, 390 NE2d 749, 752 (1979)) (emphasis added). In deciding that the advertising restriction would lower demand for electricity, this Court pointed to no record evidence, and, indeed, there was no such evidence to support the regulation.

B. The *Central Hudson* Fourth Prong

The final question under *Central Hudson* is whether the regulation is "more extensive than is necessary to serve [the governmental] interest." 447 U.S. at 566. In *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), this Court held squarely that this inquiry does not amount to a "least restrictive means" test. Instead, this Court's decisions require

> a " 'fit' between the [government's] ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served [ ]"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (citations omitted).

The Court has elaborated on this approach in subsequent decisions, but it has never retreated from *Fox's* firm

rejection of a "least restrictive means" test. To the contrary, it has repeatedly reaffirmed that holding. *See, Edge,* 509 U.S. at 429-30, *Discovery Network,* 507 U.S. 410, 416-17 nn. 12-13 (1993); *Florida Bar,* 115 S. Ct. at 2380. Accordingly, a commercial speech restriction will fail the narrow-tailoring requirement only if it "burden[s] *substantially* more speech than necessary." *Edge,* 509 U.S. at 430 (emphasis added). The existence of "numerous and obvious less-restrictive alternatives" is a "relevant consideration," although not necessarily a dispositive one, in assessing the fit between the government's regulatory means and ends. *Discovery Network,* 507 U.S. at 417 n.13. Conversely, the continued availability of alternative channels to communicate the regulated speech weighs in favor of sustaining the regulation. *See, Florida Bar,* 115 S. Ct. at 2380-2381.

Penn asserts that the Fourth Circuit's decision conflicts with *44 Liquormart*. Pet., 17. Penn's argument proceeds from a misunderstanding of the basis for this Court's holding in *44 Liquormart,* and, more fundamentally, disregards obvious differences between this case and *44 Liquormart.*

In *44 Liquormart* the Court held that Rhode Island had failed to make the requisite showing because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance." 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1521-1522 (O'Connor, J.). In particular, the Court relied on Rhode Island's authority to raise the price of cigarettes directly, either through price regulation or taxation. *Id.* at 1510 (Stevens, J.); *id.* at 1522 (O'Connor, J.). Justice Stevens also noted that another alternative, an

educational campaign directed against cigarette consumption, "might" prove to be more effective than Rhode Island's indirect attempt to reduce consumption by prohibiting price advertising. 116 S. Ct. at 1510. He did not, however, conclude that an educational campaign in fact would be more effective, nor did he suggest that a state must undertake such a campaign before it can engage in commercial speech regulation.

While *44 Liquormart* makes clear that the availability of effective non-speech related regulatory alternatives is relevant to the final prong of *Central Hudson*, the decision does not hold that the bare existence of such alternatives will always be dispositive. *Central Hudson* and its progeny have never required the government to exhaust all conceivable regulatory alternatives to commercial speech restrictions. Tellingly, in *Edge* the Court sustained the federal restriction on broadcast lottery advertising under the fourth prong of *Central Hudson* without requiring a showing that educational campaigns against gambling had been undertaken or would be ineffectual. That holding in *Edge* survives *44 Liquormart*.

Rhode Island's unconstitutional price advertising ban proceeded from the misguided and paternalistic assumption that adults would use truthful commercial information unwisely. Baltimore's law, on the other hand, proceeds from the compelling interest which the City asserts in protecting children from advertising which induces them to consume a product that they are prohibited by law from consuming. Direct criminalization, however, has proven ineffective in curbing underage drinking. Baltimore's law was enacted in support of the government's unambiguous commitment (backed by the

criminal law) to zero tolerance of underage smoking, whereas Rhode Island's law was enacted as an indirect way for the state to affect drinking behavior without unambiguously committing itself to reducing cigarette consumption.

It is entirely legitimate under the First Amendment for the government to act "paternalistically" in order to protect children. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996) (for First Amendment purposes, "the protection of children is a 'compelling interest' "); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); *Ginsburg v. New York*, 390 U.S. 629, 639-41 (1968) (same). As a result, the government may legitimately seek to protect children from the harmful effects of information that adults have a First Amendment right to see and hear. *See, e.g., Ginsburg*, 390 U.S. at 634-41 (state may prohibit sale of non-obscene materials to minors because "the state has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' ").

The impact which Baltimore's ordinance has on the ability of adults to receive cigarette advertising is not constitutionally significant in view of the many alternative channels of communication left unrestricted by the ordinance. *Florida Bar*, 115 S. Ct. at 2380-2381; *44 Liquormart*, 116 S. Ct. at 1521 (O'Connor, J.). As observed by the Fourth Circuit, Baltimore's ordinance "does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available" for cigarette advertising. *Anheuser-Busch II*, App., 53a (as adopted in *Penn II*, App., 2a).

Nor, despite its citation to *Discovery Network,* can Penn sustain its argument that Baltimore's ordinance is unconstitutionally underinclusive. The ban on commercial newsracks in that case was struck down because such newsracks were no greater an eyesore than the non-commercial newsracks which were left unregulated, thus establishing that Cincinnati drew a distinction between commercial and non-commercial speech which bore no relationship whatsoever to the particular interest the City had asserted. 113 S. Ct. at 1508-1509. It is otherwise as to the distinction between outdoor advertising and the many other channels of communication which Baltimore's ordinance leaves free from restriction. Long ago this Court recognized that billboards are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation. *Packer Corp. v. Utah,* 285 U.S. at 110. It is the tendency of billboards to be immune from all attempts at parental supervision which motivated Baltimore to restrict billboards in particular.

Similarly, Penn's underinclusiveness argument, based on the ordinance's disparate treatment of various types of outdoor advertisements for cigarettes (Pet., 18), is foreclosed by *Metromedia* and *Edge.* In *Metromedia,* San Diego's billboard ordinance was attacked as impermissably underinclusive because of its failure to ban on-site as well as off-site advertising. This Court squarely rejected that argument: "[W]hether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising." 453 U.S. at 511 (plurality opinion); *id.* at 551

(opinion of Stevens, J., concurring in part and dissenting in part).

Edge involved a federal statutory restriction barring radio broadcast of lottery advertisements by stations licensed in a non-lottery state. The purpose of the restriction was to protect state choice concerning lotteries. Edge Broadcasting Co. owned a station in North Carolina, a non-lottery state, but 92% of the station's audience was composed of residents from a populous city in nearby Virginia, a lottery state. Edge argued, and the lower courts held, that the advertising restriction was fatally underinclusive as applied to it because too much commercial speech about the Virginia lottery had been left unrestrained for the restriction to "directly advance" Congress' purpose. In rejecting that argument this Court held:

> We have no doubt that the fit in this case was a reasonable one. . . . [A]pplying the restriction to a broadcaster such as Edge directly advances the governmental interests. . . . *We think this would be the case even if it were true, which it is not, that applying the general statutory restriction to Edge, in isolation, would no more than marginally insulate the North Carolinians in the North Carolina counties served by Edge from hearing lottery ads.*

509 U.S. at 429-430 (emphasis added).

* * *

On August 28, 1996, the FDA published in the *Federal Register* "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents" (the "Rule"). 61 Fed. Reg. 44396

(1996). The Rule governs the sale, promotion, and distribution of nicotine-containing cigarettes in order to protect children and adolescents. FDA's decision to regulate cigarettes and smokeless tobacco to reduce the use of those products by persons under 18 was based on the most comprehensive rulemaking in the agency's history. To develop its proposed rule and jurisdictional analysis, the agency assembled and considered a record containing over 200,000 pages of factual and analytical materials. 61 Fed. Reg. 44557. After publishing the proposed rule and jurisdictional analysis on August 11, 1995, 60 Fed. Reg. 41314, 41453 (1995), FDA received over 700,000 comments from the public. 61 Fed. Reg. 44557. The Rule was supported by studies on the effect of cigarette advertising on children and adolescents. 60 Fed. Reg. 41314-41321.

The Rule, effective August 28, 1997, reduces the amount of imagery that makes cigarettes attractive to children and adolescents; limits advertising to which children and adolescents are exposed to text-only format; and bans outright advertising of tobacco products located within 1,000 feet of schools and playgrounds. *See*, 61 Fed. Reg. 44615-44618. Furthermore, pursuant to 21 U.S.C. §360k(a), Baltimore's ordinance will become preempted on August 28, 1997. This case will be mooted on that date, subject only to the possibility of being resuscitated as a case or controversy if the Secretary of Health and Human Services grants Baltimore an exemption from preemption pursuant to 21 U.S.C. §360k(b).

The Baltimore ordinance challenged in the instant case pales in significance compared to the sweeping federal regulation of cigarette advertising which has been adopted by the FDA. The time for this Court to wade into

the controversy over restricting cigarette advertising is not now; if it ever arrives the proper time will be when the Court is faced with a case involving a challenge to advertising restrictions of *national* scope, such as those adopted by the FDA.

Indeed, the constitutionality of the FDA's cigarette advertising regulations is currently the subject of four consolidated lawsuits pending in the United States District Court for the Middle District of North Carolina (Greensboro Division).[2]

II. THE FOURTH CIRCUIT CORRECTLY DECIDED AN ISSUE OF FIRST IMPRESSION ARISING UNDER THE PREEMPTION SECTION OF THE FEDERAL CIGARETTE LABELING AND ADVERTISING ACT

The second question presented in the petition concerns whether the Fourth Circuit erred in rejecting Penn's preemption argument under 15 U.S.C. § 1334(b). None of the reasons for Supreme Court review advanced by Penn withstand scrutiny.

There is no split of the circuits on the question presented in the petition. *Vango Media, Inc. v. City of New York*, 34 F.2d 68 (2nd Cir. 1994), involved significantly

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[2] *Coyne Beahm, Inc., et al. v. United States Food and Drug Administration, et al.*, (Case No. 2:95CV00591); *American Advertising Federation, et al. v. David A. Kessler, M.D., et al.*, (Case No. 2:95CV00593); *United States Tobacco Company, et al. v. United States Food and Drug Administration, et al.*, (Case No. 6:95CV00665); and *National Association of Convenience Stores, et al. v. David A. Kessler, M.D., et al.*, (Case No. 2:95CV00706).

different facts and issues from the instant case. In *Vango*, the Second Circuit held that a regulation of the *content* of cigarette advertising, requiring a minimum of one public health message to be displayed for every four tobacco advertisements displayed on property and facilities licensed by New York City, was preempted by 15 U.S.C. §1334(b).

The point of distinction between *Vango* and the instant case is captured in Judge Murray's opinion for the district court.

> But *Vango* substantially differs from the present case. The New York law required, as a condition of cigarette advertising, a different message regarding the health risks of smoking than the federally-mandated warning, thus brining the statute into conflict with the second stated purpose of the FCLAA. . . . Ordinance 307 does not require any message at all, let alone a message that conflicts with the one mandated by Congress.

App. 44a. *See also*, App. 10a-11a (court of appeals cites *Vango* with approval).

The decision of the Fourth Circuit does not subject cigarette manufacturers to any restriction concerning the content of their advertising, and thus cannot have a negative impact on the national economy and thereby upset the balance struck by Congress in 15 U.S.C. §1334(b). The language and legislative history of the Act make it abundantly clear that Congress was concerned only with protecting the tobacco industry from the chaos of local laws that would alter the content or regulate the message of cigarette commercials. Local or state content regulation would make it difficult to market cigarettes on a national

scale with national themes and messages. Baltimore's ordinance does not regulate content and thus poses no threat to Congress' purpose in enacting the preemption section.[3]

Furthermore, as this Court held in *Cipollone*, there is a strong presumption against preemption, and § 1334(b) must be narrowly construed. 505 U.S. at 516. In *Cipollone* the Court held that tort claims against cigarette manufacturers based on fraud and misrepresentation are not preempted because they are not "based on smoking and health" as that phrase of § 1334(b) is properly construed, but rather on a more general obligation – the duty not to deceive. *Id.* at 529. Similarly, as observed by the Fourth Circuit, since the Baltimore ordinance "simply restricts the location of cigarette-advertising signs, irrespective of the nature of the message communicated," the ordinance "neither imposes a duty nor relieves a burden on cigarette advertisers *based on smoking and health.*" App., 11a (emphasis in original). *Compare, Mangini v. R.J. Reynolds*

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[3] In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 513 (1992), this Court referred to a 1965 statement by renowned tobacco foe Senator Frank Moss of Utah, the floor leader who guided the 1969 Act through the Senate. Senator Moss stated that his own state was considering a cigarette warning label requirement, but that he "[did] not favor individual state action in this matter because of the maze of confusing regulations which would result." 111 Cong. Rec. 13901 (1965). Senator Moss never expressed any reservation about Utah's complete ban on any public display of cigarette ads on such media as billboards, transit signs, and point-of-sale displays that had been on the books for forty years and had always been enforced. Nor did anyone else. *See, Packer Corp. v. Utah*, 285 U.S. 105 (1932) *and* Utah Code Ann. § 76-10-102.

Tobacco Co., 875 P.2d 73 (Cal. 1994), *cert. denied*, 115 S. Ct. 577 (1994) (consumer's suit against cigarette manufacturer and its advertising agencies for injunctive relief, asserting claims of unfair business practices and unjust enrichment in connection with manufacturer's advertising campaign allegedly targeted at minors, held not preempted by 15 U.S.C. § 1334(b)).[4]

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[4] As observed in both *Cipollone* and *Mangini*, the Senate Report regarding the 1969 Act emphasized that 15 U.S.C. Section 1334(b) is narrowly phrased to preempt only state action based on smoking and health, but "[i]t would in no way affect the power of any State . . . with respect to the taxation of *the sale of cigarettes to minors*, or the prohibition of smoking in public buildings, or *similar police regulations*. S. Rep. No. 91-566, p. 12 (1969) (emphasis added). *See, Cipollone*, 505 U.S. at 529 n.26; *Mangini*, 875 P.2d at 81.

In *Mangini* the court also observed that Congress has enacted legislation allowing certain monetary grants to states, but "only if the State involved has in effect a law providing that it is illegal for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product to any individual under the age of 18, and "will enforce" that law. 42 U.S.C. § 300x – 26(a), (b). A state receiving such a grant must agree to develop "strategies to discourage the use of . . . tobacco products by individuals to whom it is unlawful to sell or distribute such products." 42 U.S.C. § 300x – 22(b)(2)(B), *quoted in Mangini*, 875 P.2d at 82.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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